

## Ball, Dayna M.

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**Subject:** Mail - G Messerli, Mud Lake Wtr Users Ltr 11/8/02  
**Start Date:** Friday, November 08, 2002  
**Due Date:** Tuesday, November 12, 2002

**Status:** Completed  
**Percent Complete:** 100%  
**Date Completed:** Tuesday, November 12, 2002

**Total Work:** 0 hours  
**Actual Work:** 0 hours

**Owner:** Ball, Dayna M.

11/8/02 letter mailed to Gerald Messerli, Mud Lake Water Users  
PO Box 68  
Terreton, Id 83450

Filed this letter and original correspondence in Mud Lake & Tributaries WD 31, 2002 file.

Copies of letter and background correspondence including:

**10/17/02 ltr from Messerli to Tim regarding District 31 Watermaster & cleaning of Camas Creek**  
**June 2002 SRBA Case No. 39576, Subcase Nos.: 31-184, Standard Form 5, Stipulated Elements of a Water Right (1 page)**  
**7/10/95 ltr from Barbara Benge, Army corp of engineers to Donald Shenton, prior watermaster WD 31**

Copies went to:

Greg Shenton, Watermaster  
Mud Lake Water District 31  
PO Box 33  
Dubois, Id 83423

Ron Carlson  
IDWR Eastern Region  
(Interoffice mail)

Bob Saban, Supervisor  
Upper Snake Region  
Idaho Fish & Game  
1515 Lincoln Rd  
Idaho Falls, ID 83401

Tracy Trent, Chief  
Natural Resource Policy Bureau  
Idaho Fish & Game  
600 S Walnut St.  
Boise, Id 83707

Rob Brochu  
Idaho Falls Regulatory Office  
US Army Corp of Engineers  
900 N Skyline Dr Ste A  
Id Falls, Id 83402-1718



State of Idaho

## DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098  
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: [www.idwr.state.id.us](http://www.idwr.state.id.us)

DIRK KEMPTHORNE  
Governor

KARL J. DREHER  
Director

November 8, 2002

Gerald Messerli, President  
Mud Lake Water Users, Inc.  
PO Box 68  
Terreton, ID 83450

Re: Water District 31 Watermaster and Cleaning of Camas Creek

Dear Mr. Messerli,

I have reviewed your letter dated October 17, 2002 regarding removal of beaver dams and cleaning of Camas Creek. Your correspondence is in reply to a recent letter that I sent to all state water district watermasters reminding them that their role as public officials is limited to those actions as set forth by statute. I appreciate the several important points raised in your response. However, as you suggest at the close of your letter, I believe that you may have misunderstood my correspondence or that there is a misunderstanding of the law and documents referenced in your letter.

Your letter does correctly state our current understanding that permits and/or review from the Army Corps of Engineers is not required for removal of beaver dams that are less than one year old. The Department however does not share quite the same interpretation as you regarding the general provision that was included in the Snake River Basin Adjudication (SRBA) Director's Report for Administrative Basin 31. The general provision that you reference states that stream channel obstructions may be removed "in accordance with applicable law." The Department believes that Section 36-1107, Idaho Code is the applicable law with respect to removal of beaver dams. The SRBA general provision does not exempt local water users or the watermaster of Water District 31 from this particular statute.

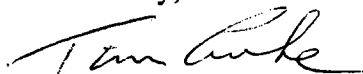
The Department is sensitive to your concerns regarding coordination with the Idaho Department of Fish and Game (IDFG) as well as the time it may take to obtain a permit under Section 36-1107. It is the understanding of IDWR that any water user who wishes to remove a beaver dam on his or her own property may get authorization from IDFG for immediate removal. IDFG can authorize property owners to either remove dams themselves or to hire other individuals to cause removal of dams. I have discussed this matter with IDFG managers at both the state and regional offices and have been assured that IDFG will provide prompt authorization for removal of beaver dams if requested by the owner of the property where such dams are located. This approach is consistent with the SRBA general provision as long as IDFG receives the request or consent from the owner of the property where the dam is located.

The real problem with gaining the necessary approvals for removal of beaver dams seems to occur when water users want to remove a dam that is located on property where the owner does not consent to removal of the dam. In such cases IDWR remains firm in its direction that all interested parties adhere to the provisions of Section 36-1107. We realize that following the letter of the law may take some additional time and effort toward removal of dams, including addressing the objections of the property owner. However, any action taken in these cases by water users or watermasters that is not consistent with Section 36-1107 may result in undesirable consequences, including litigation against the water users, the watermaster, the water district and IDWR.

I have discussed the contents of your letter with both regional and state office IDFG staff. Both IDWR and IDFG agree on the procedures for implementation of Section 36-1107. IDFG agrees that immediate authorization can be granted in situations where the landowner requests removal of a beaver dam on his or her property. If a property owner objects to removal of dam and both IDWR and the local watermaster has determined that the dam is injuring water rights, IDFG will work with IDWR, the water district and the property owner on addressing the concerns of the owner. If the objections of the owner cannot be addressed to the owner's satisfaction IDFG will obtain a court order for removal as long as injury is demonstrated.

I welcome any further ideas, concerns or questions you may have regarding this issue. I or regional IDWR staff would be happy to personally visit with you and the watermaster, as well as IDFG representatives, in order to develop a workable approach toward removal of beaver dams that is both within the limits of the law and satisfactory to the water users in your area.

Sincerely,



Tim Luke

Manager, Water Distribution Section

Cc: Greg Shenton, Water District 31 Watermaster  
IDWR Easter Region  
Bob Saban, IDFG Regional Supervisor  
Tracy Trent, IDFG, Chief, Natural Resource Policy Bureau  
Rob Brochu, US Army Corps of Engineers

**MUD LAKE WATER USERS, INC**  
**P.O. BOX 68 1400 E 1500 N**  
**TERRETON, IDAHO 83450**

**PHONE (208) 663-4359**  
**FAX (208) 663-4369**  
**E-mail mudlakeh2o@dcdi.net**

Tim Luke, Water Distribution Section Manager  
Idaho Department of Water Resources  
1301 North Orchard Street  
Boise, Idaho 83706

October 17, 2002

**RECEIVED**

**OCT 23 2002**

Re: District 31 Watermaster & cleaning of Camas Creek

*Department of Water Resources*

Dear Tim Luke, Water Distribution Section Manager:

We have recently been shown a copy of your letter to watermasters regarding stream construction work & beaver dam removal. We are distressed by your interpretation of the existing laws & precedents. Historically, the watermaster in our district has played a role in the maintenance & cleaning of Camas Creek & it's tributaries. This dates back to 1930s & the Suave Decree. This federal decree set forth the administration of water in the Mud Lake Basin & clearly gives the watermaster final say on cleaning & dam removal. In the decades following the Suave Decree, the removal of beaver dams was handled by the Fish & Game at the request of the watermaster. As time went on the procedures used became slower & slower until finally Fish & Game refused to remove dams at all. From that point on the removal of dams was handled by the watermaster or those designated by him. More recently, we were told that the Clean Water Act prevented the removal of beaver dams. After several years & more legal battles we received the attached letter (dated 1995) from the Department of the Army saying in part:

"... you may remove beaver dams which are less than 1 year old, without contacting us and without obtaining a Department of Army permit."

Since that time we have followed the practice of removing all dams less than 1 year old. This has been done when the watermaster determined them to be obstructing the natural flow of the water & harming downstream right holders in accordance with the Suave Decree. In all of our dealing with the Department of Fish & Game we have found them to be anti-water user & slow to respond to removal requests. In fact it was this attitude that resulted in the letter from the Department of the Army.

We agree that there should be a quantifiable damage to a right holder before such action should be taken & that it is the job of the watermaster, as a neutral party, to make this judgment. However your letter implies that the Fish & Game is responsible for the actual removal. We are telling you that they will not take any action of that sort & that they will go to almost any lengths to prevent us from doing so. In cases such as this, time is of the essence as the stock & crops, which rely on the water, can be irreversibly harmed in a matter of a few days. This is why during the current adjudication process we filed to have our original federal decree language inserted into the general provisions governing our water district. After some more legal disputes these provisions have been included in the final recommendations. On the surface it would appear that you are attempting to circumvent that document. We have attached a copy of the agreement signed by the IDWR for your reference.

We feel that the fact that the water rights & watermaster duties have been clearly stated in a federal decree should be taken into consideration when dealing with this water district. We are the only area of the state that has a federal decree & to be blunt we plan to continue our practices in accordance with it. If you feel that we have misunderstood your letter or that we are misinterpreting the law please contact us at the above address.

Sincerely,



Gerald Messerli

President, Mud Lake Water Users, Inc

10/18/2002

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase Nos.: 31-134

STANDARD FORM 5

STIPULATED ELEMENTS OF A  
WATER RIGHT

This form is used to report the stipulated elements of one water right acquired under state law and/or one federal reserved water right. Submission of this form will not automatically result in the issuance of a partial decree. The Presiding Judge or Special Master will conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right.

The parties agree that the Snake River Basin Adjudication Court has jurisdiction of the parties and subject matter to enter a partial decree for this water right; that they have been served with sufficient process, according to the law; and that they have appeared, prosecuted, and defended their positions with regard to this water right dispute.

*The parties and IDWR agree and stipulate that the following language should be added as an additional General Provision for Basin 31 in addition to the "Connected Sources in Basin 31 (Conjunctive Management General Provision)" already recommended.*

No dam or other obstruction to the natural flow of Camas Creek or its tributaries shall be maintained so as to divert water from the channel of the stream, except through ditches, canals or other works provided with head gates, control works and measuring devices. Holders of water rights to divert water from Camas Creek or any of its tributaries, their successors, agents, servants and employees are hereby perpetually enjoined and restrained from maintaining in any stream or slough, or permitting to exist within such stream or slough where the same traverses their respective lands, or any land owned or controlled by them, any obstruction to the flow of water, except in connection with the diversion of water through head gates equipped with measuring devices. In case any water right holder shall fail to remove any obstruction from the natural channel of Camas Creek or any of its tributaries within 7 days after receiving notice from the watermaster, who has determined that the obstruction interferes with water delivery, the watermaster may authorize a water user to remove such obstruction in accordance with applicable law. The expense thereof shall be the responsibility of the water right holder requesting the removal.

/s/ Kent Foster                      6/24/02  
Claimants                              Date

/s/ John Marshall                      6/26/02  
Respondents                              Date

/s/ David R. Tuthill, Jr.                      6/27/02  
IDWR Concurrence                              Date

/s/ Candice M. McHugh                      6/27/02  
Attorney for IDWR                              Date



DEPARTMENT OF THE ARMY  
WALLA WALLA DISTRICT, CORPS OF ENGINEERS  
201 NORTH THIRD AVENUE  
WALLA WALLA, WASHINGTON 99362-1876

Reply To  
Attention Of:

July 10, 1995

Operations Division

SUBJECT: NPW No. 950500020

Mr. Donald W. Shenton  
Water District No. 31  
P.O. Box 33  
Dubois, Idaho 83423

Dear Mr. Shenton:

This confirms our policy on the removal of beaver dams, as you requested in your letter of June 20, 1995. Under Section 404 of the Clean Water Act (33 U.S.C. 1344), a Department of the Army permit is required for the discharge of dredged or fill material into waters of the United States, including wetlands. This includes excavation activities which result in the discharge of dredged material and destroy or degrade waters of the United States.

The removal of beaver dams is an excavation activity that requires a Department of the Army permit. However, we find the removal of recently established beaver dams may not result in a discharge of dredged material or destroy or degrade waters of the United States, therefore you may remove beaver dams which are less than 1 year old, without contacting us and without obtaining a Department of the Army permit.

You should contact us if you will be removing a beaver dam which is older than 1 year. We will inspect the beaver dam and review your proposed excavation method. If we determine your work will result in the discharge of dredged material and destroy or degrade a water of the United States, a Department of the Army permit will be required. I am enclosing our permit application pamphlet containing an application form and a drawing sheet, for use in preparing your application.

You said you were disappointed it took so long for us to respond to your letter of last August. Our regulations governing the excavation of fill material were new at the time we received your letter and the issue of beaver dams had not yet been addressed by our office. Our Office of Counsel needed to review the Federal Court Decree which directs you to remove obstructions from the streambed. We felt our determination would be precedent setting. We are sorry for the long wait and apologize for any inconvenience it caused you.

You asked what would happen if we do not approve a permit. In such cases, an application would be denied and the work, as proposed, would not be authorized. This denial would not preclude you from reapplying with a different project design which would have less than minimal impact.

You also asked in what situations we would deny a permit. In processing your application, we must evaluate the social, economic, and environmental benefits and detriments of your proposed work in relation to the public interest. The benefits of the work you propose must outweigh its reasonably foreseeable detriments and be in the public interest. If required Federal, state, or local authorization has been denied for your project or your work does not receive water quality certification or waiver of certification from the State of Idaho, Division of Environmental Quality we are required to deny your permit without prejudice.

We must also determine if your project complies with the Environmental Protection Agency's 404 (b) (1) Guidelines for review of permit applications. These guidelines require that any project that is approved must be shown to be the least damaging practicable alternative. The guidelines state that for non-water dependent activities, there is a presumption that there are alternative sites for the work that are less damaging to aquatic resources. An applicant must demonstrate that practicable alternatives do not exist before a permit can be issued. No discharge shall be permitted if it violates State water quality standards or jeopardizes the continued existence of species listed as endangered or threatened. The guidelines state that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Finally, you must design your project to minimize adverse impacts to the aquatic ecosystem to the maximum extent possible and then show how you will mitigate for any remaining unavoidable impacts.

We look forward to working with you. If you have any questions, please contact Mr. Ray Kagel of my Idaho Falls Regulatory Office, telephone 208-522-1645.

Sincerely,

*Barbara C. Bengé*

Barbara C. Bengé  
Acting Chief, Regulatory Branch

Enclosure